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Supreme Court, U.S.
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In The

Supreme Court of the United States

KENNETH VICKNAIR,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A criminal defendant's constitutional right to testify at his or her trial is an essential part of due process of law. The question presented is whether a claim that this right has been abrogated should be reviewed under the *Strickland* standard for ineffective assistance of counsel, or under the knowing, intelligent and voluntary waiver standard espoused by this Court for all other fundamental constitutional rights.

PARTIES TO THE PROCEEDINGS BELOW

Kenneth Vicknair
The United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Vicknair respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on February 4, 2009, to address the important question of federal law raised by this judgment.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals giving rise to this petition is *United States v. Vicknair*, an unpublished opinion, No. 07-30932. A copy of the opinion of the Court of Appeals for the Fifth Circuit denying the application for a certificate of appealability is attached to this petition as Appendix A. Similarly, the opinion of the district court denying petitioner post-conviction relief is unreported and that decision is also attached hereto as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On February 2, 2007, in the United States District Court for the Eastern District of Louisiana, Kenneth Vicknair filed a motion under 18 U.S.C. § 2255 to vacate his judgment of conviction dated August 2, 2005. On August 3, 2007, the district court

denied the motion, and on December 5, 2007, it denied Vicknair's motion for a certificate of appealability. Thereafter, Kenneth Vicknair timely filed a motion for a certificate of appealability in United States Court of Appeals for the Fifth Circuit. On February 4, 2009, the Court of Appeals for the Fifth Circuit denied the motion for a certificate of appealability. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) and this petition is timely under Supreme Court Rule 13.3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This case has at its core the preschool truism that just because you say it doesn't make it so. In Vicknair's case, the Court of Appeals for the Fifth Circuit has determined that Vicknair's claim that defense counsel unilaterally waived his right to testify is a Sixth Amendment claim of ineffective assistance of counsel. Saying however, does not make it so. The violation complained of here is a violation of due process, and as the facts and the law demonstrate, the appellate court's use of the ineffective assistance of counsel standard does an injustice to the significance of the constitutional right at issue, to the personal dignity of the defendant, and to the trial process.

The case begins simply enough, and is all too similar to the myriad of "right-to-testify cases" which plague the courts in post-conviction proceedings. Vicknair was convicted by a jury of one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) and one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1343. The charges arose out of Vicknair's attempted sale of Venezuelan securities to undercover Secret Service agents posing first as businessmen, then as Columbian drug cartel members. It was the government's contention that these securities were counterfeit, and that Vicknair knew that the individuals to whom he was going to sell the securities intended to use money derived from narcotics to purchase them.

Vicknair was represented at trial by a seasoned criminal defense attorney, and his associate. Vicknair was intent on proving his innocence at trial, and even his lawyers believed that his defense was "a good one." He had no prior criminal record, and had openly discussed with an Assistant United States Attorney, on two different occasions well before charges were brought, the securities he had been trying to broker. Moreover, Vicknair had a reasonable, credible defense: the securities were in fact legitimate, and he was unaware, until the meeting itself, that the proposed purchasers were associated with any criminal enterprise. Vicknair's apparent acquiescence to their purchase of the securities with "dirty" money, as communicated by his taped comment that he did not care where the money came from, was merely his attempt to extricate himself from what had become a very dangerous situation. Given that this was Vicknair's only meeting with the undercover agents – because he was arrested at its conclusion – his state of mind would be the critical issue at trial.

Over the course of the preparation for trial, Vicknair repeatedly voiced his desire to testify because of the complexity of the facts involved and the nature of his defense. Vicknair's lawyers felt that their preparation for the case had enabled them to ensure that the government would not attempt to prove that the bonds were counterfeit. The defense team had assembled a variety of witnesses, evidence, and expert testimony which would establish the basic elements of the proposed defense. Nevertheless, Vicknair continued to express his desire to testify, and his

feeling that only he could explain his version of the facts, and thus his innocence, to the jury. Although defense counsel had communicated his qualms about putting Vicknair on the stand, there was no agreement that he would not testify.

As trial approached, Vicknair continued to assert his desire to testify, even as he presumed that his counsel would be putting on a defense that might not necessitate his testimony. Without doubt, Vicknair was not prepared for the turn of events at trial. At the end of the government's case, defense counsel called a bench conference, and informed the court that the defense intended to rest. He did not first consult with Vicknair, either as to his decision to rest without putting on evidence, or as to Vicknair's waiver of his right to testify. The jury was excused for lunch, and the court heard argument on the Rule 29 motion, which was denied. After a recess, the defense formally rested, putting on no evidence and calling no witnesses.

By his own attorney's admission at the hearing on the § 2255 motion, Vicknair was surprised when the defense rested without calling any witnesses or presenting any evidence. His lawyers had not consulted him beforehand, and there had never been a final decision as to whether he would testify. Whatever discussion there had been prior to trial about his testifying had presumed that the defense would be putting on a case. On the second day of trial, however, defense counsel unilaterally decided not to put on a case. Unaware that ultimately he, and not his attorney,

possessed the authority to waive the right to testify, or that he could overrule his lawyer, Vicknair remained silent before the court, and in due time, the jury found him guilty. In fact, both lawyers for Vicknair testified at the hearing on his § 2255 motion that they had not discussed with him that the decision to testify was his and only he had the right to waive it.

Vicknair brought a claim that he was denied his constitutional right to testify in a motion to vacate, pursuant to 28 U.S.C. § 2255, which was denied by the district court. The court made no analysis of the constitutional right. Assuming without concluding that his counsel's performance was objectively unreasonable, the court reasoned that any alleged errors in precluding the client's testimony at trial created no prejudice because Vicknair demonstrated that he was not a credible witness. Thus, the district court's determination that Vicknair's claim that his constitutional right to testify was vitiated by his attorney's actions was evaluated as an ineffective assistance of counsel claim, which failed as a matter of course upon the Court's conclusion that Vicknair could not establish prejudice under the second prong of the test articulated in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). There was no analysis of whether or not Vicknair had made a knowing, intelligent or voluntary waiver of his right to testify.

The issue was presented squarely to the Court of Appeals for the Fifth Circuit in an application for a certificate of appealability, in which Vicknair again claimed a denial of a constitutional right, premised on his lawyer's failure to consult with Vicknair, or to advise his client that he possessed the ultimate

authority to decide whether or not to testify. The Court of Appeals held, without further explication of the issues, and no mention of waiver, that Vicknair had failed to make the required showing that jurists of reason "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," citing *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). Accordingly, the Court denied the motion for a certificate of appealability. This petition follows.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, particularly since that decision conflicts with decisions of this Court, and thus must be corrected.

Kenneth Vicknair's claim that defense counsel denied him his right to testify claims a violation of a fundamental constitutional right. It is thus, in substance, a violation of due process, and not a claim of ineffective assistance of counsel under the Sixth Amendment. For the violation of a defendant's right to testify is much more than the sum of his counsel's errors. It is the denial of so fundamental and personal a right that the violation undermines our notions of fairness. Treating the denial of the right to testify as a claim of ineffective counsel, as the Court of Appeals for the Fifth Circuit has done, rather than a due

process violation in its own right, sidesteps this Court's insistence that fundamental constitutional rights may be waived only by the defendant. Moreover, such a waiver must be done knowingly and intelligently.

Further, reliance on the Sixth Amendment test requires a defendant to demonstrate prejudice, when no such showing should be required to vindicate a personal constitutional right. The Court must face the dilemma presented by the use of the *Strickland* standard to evaluate this constitutional violation, and grant the petition.

A. The nature of the constitutional right

This Court has described the right to testify as "fundamental to a personal defense" of every criminal defendant. *Rock v. Arkansas*, 484 U.S. 44, 49-53 (1987). In *Rock v. Arkansas*, the Court held what it had long presumed, that the right to testify is a constitutional right, firmly rooted in the Fifth, Sixth, and Fourteenth Amendments, and "essential to due process of law in a fair adversary process." *Id.* at 51, *quoting Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975). Indeed, the right to testify is one of the fundamental constitutional decisions a defendant makes regarding his or her case, along with whether to plead guilty, waive a jury or take an appeal. *See Jones v. Barnes*, 463 U.S. 745 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to

plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.") *Id.* at 751; *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C.J., concurring) ("Only such basic decisions as whether to plead guilty, waive a jury or testify in one's own behalf are ultimately for the accused to make.").

In the company of other fundamental constitutional rights, the right to testify is entitled to the same protection accorded those rights by the requirement of a knowing and intelligent waiver. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973). This Court has required that waiver of a right fundamental to the guarantee of a fair trial must be knowing, intelligent and voluntary, and that waiver is reserved to the defendant alone. *Johnson v. Zerbst*, 304 U.S. 458 (1938) (waiver of right to counsel must be made knowingly and competently); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (guilty plea is a fundamental right and must be made intelligently and voluntarily); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942) (jury trial).

It is thus puzzling that while the majority of the Circuits have concurred that the right to testify is indeed a fundamental constitutional right personal to the defendant and capable of waiver only by the defendant,[1] few have actually cloaked the right to

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[1] *See, e.g., Lema v. United States*, 987 F.2d 48, 52 (1st Cir.1993); *United States v. Pennycooke*, 65 F.3d 9, 10 (3d Cir.1995); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir.1991); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir.1994), *vacated without*

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testify with the procedural protections accorded other fundamental rights by decisions of this Court.

For example, the requirement that the court advise the defendant of his constitutional right, and obtain an on the record waiver, as in the case with other fundamental rights such as the right to go to trial, plead guilty, or be represented by counsel, has been almost universally rejected. *See United States v. Lore,* 26 F. Supp.2d at 736, n. 8, listing cases: *United States v. Pennycooke*, 65 F.3d at 11; *United States v. Brimberry*, 961 F.2d 1286, 1289-90 (7th Cir.1992); *United States v. Teague*, 953 F.2d at 1533, n. 8; *United States v. Campione*, 942 F.2d 429, 439 (7th Cir.1991); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir.1991); *United States v. McMeans*, *supra*; *United States v. Edwards*, 897 F.2d 445, 447 (9th Cir.), *cert. denied*, 498 U.S. 1000 (1990); *United States v. Martinez*, 883 F.2d 750, 757 (9th Cir.1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir.), *cert. denied*, 501 U.S. 1249 (1991); *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir.1987); *United States v. Bernloehr*, *supra*; *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir.1983), *cert. denied*, 465 U.S. 1036 (1984). At the heart of this reluctance is the notion that the right to testify is, at

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considering this point, 53 F.3d 94 (5th Cir.1995) (*en banc*); *Rogers-Bey v. Lane*, 896 F.2d 270, 283 (7th Cir.1990), *cert. denied*, 498 U.S. 831 (1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir.1987); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir.1993); *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir.1992) (*en banc*), *cert. denied*, 506 U.S. 842 (1992); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C.Cir.1996).

base, a strategic decision, and that it is incumbent on counsel, and not the court, to explain the contours of the right and obtain an informed waiver. *See United States v. Martinez*, *supra*, 883 F.2d at 756; *United States v. Leggett,* 162 F.3d 237, 246 (3d Cir.1998).

B. The misuse of the *Strickland* standard

Some circuit courts analyze the claim strictly as a Sixth Amendment deprivation of the right to effective assistance of counsel and thus utilize the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 686 (1984), with its prejudice requirement that the attorney's deficient performance deprived the defendant of a fair trial, to determine the defendant's claim that his right to testify has been denied by counsel. *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir.), *aff'd*, 39 F.3d 873 (8th Cir.1994) (*en banc*), *cert. denied,* 514 U.S. 1075 (1995). The belief that it is the responsibility of defense counsel to advise the defendant of his constitutional right to testify, and ensure its waiver underlies the conventional view among the circuits that a defendant claiming that counsel denied him his constitutional right must raise the claim as one of ineffective assistance of counsel. *United States v. Teague*, 953 F.2d at 1534. The Ninth and Fourth Circuits have gone a step further, holding that a defendant's waiver of the right may be inferred from his silence at trial, which functions both as a presumption that his attorney properly informed him of his right and that his waiver was knowing and

intelligent. *United States v. McMeans*, *supra*, *United States v. Martinez*, *supra*.

Courts viewing the violation of the right to counsel as the violation of a fundamental right, and thus sounding in the Fifth and Fourteenth Amendments, nonetheless utilize the ineffective assistance of counsel standard, regardless of its failings in recognizing and protecting the unique qualities of the fundamental right of a defendant to speak to the jury. This is the rule in the Fifth Circuit, where the Court of Appeals has held that ineffective assistance of counsel is an appropriate vehicle for a defendant's claim that counsel denied him the right to testify. *See United States v. Brown*, 217 F.3d 247, 261 (5th Cir.2000), *remanded on other grounds*, *Randle v. United States*, 531 U.S. 1136 (2001). Indeed, the Fifth Circuit distinguishes claims where the defendant contends that it was his counsel who interfered with the right to counsel as an ineffective assistance of counsel claim, utilizing a different standard for the violation of the substantive right when the defendant is deprived of the right to testify by the court or the prosecution. *United States v. Mullins*, 315 F.3d 449, 452-53 (5th Cir.2002), *citing Brown*, 237 F.3d at 258-59. Yet in these cases, the Circuit simply assumes that counsel's denial of the right to testify is an ineffective assistance of counsel claim without tackling the seeming inconsistency between that conclusion, and the fundamental, personal nature of the right itself, which under the multitude of holdings by this Court, should entitle the right to testify to the

procedural safeguard of a knowing and intelligent waiver.[2]

This Court must address the circuit court's misunderstanding of this inconsistency and end the perpetuation of the notion that the ineffective assistance of counsel claim is an "appropriate" vehicle to raise a denial of due process claim, a notion that permeates the other circuit courts. Evaluating counsel's performance under *Strickland*, rather than the defendant's understanding of his right to testify and the circumstances of his waiver, under *Johnson v. Zerbst*, *supra*, centers the inquiry on the wrong party, for the wrong reasons. The question is not only what advice counsel provided, or if he provided any at all, but what the defendant understood when he waived the right to testify. As in this case, if a defendant is unaware of his authority to make the ultimate decision whether to testify, his purported waiver of that right through counsel is neither knowing nor intelligent. Indeed, there is no waiver, for only the defendant, and not his counsel, may waive a fundamental personal right.

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[2] Although a panel of the Court had previously expressed the firm conviction that the right of a defendant to testify is a right separate and apart from the right to counsel, and that treating the claim as one of ineffective assistance of counsel denigrates the character of the right as one personal to defendant and incapable of waiver by counsel, that panel opinion was vacated on other grounds, *Jordan v. Hargett*, *supra*, 34 F.3d at 316, n. 5.

The requirement that a defendant demonstrate prejudice under the ineffective assistance of counsel analysis is also problematic. First, without doubt an attorney's failure to advise his client that the decision to testify is his, and his alone, or to consult with the client on its waiver, would constitute ineffective assistance of counsel by any standard.[3] Since no strategic or tactical decision permits counsel to usurp from his client the basic right to put his testimony before the jury, prejudice should be presumed. Nevertheless, the district court here required that Vicknair demonstrate that his counsel's performance prejudiced the defense, as defined by *Strickland*. 466 U.S. at 694. Because the court believed that it was likely that the jury would not have found Vicknair's testimony credible, it rejected Vicknair's claim, out of hand, for failure to fulfill the prejudice requirement.

As at least one district court has observed, the *Strickland* prejudice prong is antithetical to the very

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[3] The American Bar Association's Standards for Criminal Justice ("ABA Standards") provides that the right to testify is one of the decisions relating to the conduct of the case which are ultimately for the accused to make, after consultation with counsel, along with the decision to waive a jury trial or enter a plea. Standards for Criminal Justice Standard 4-5.2(a) (2d ed.1980). This is echoed by Rule 1.2(a) of the ABA Model Rules, which states that "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea entered, whether to waive jury trial and whether the client will testify."

notion of the right to testify as a right fundamental to due process and a fair trial because "a defendant's right to testify in a criminal proceeding against him [is] so basic to a fair trial that its infraction can never be treated as harmless error, which is in essence the inquiry required to be made by the second, prejudice to the defendant, prong of *Strickland.*" *United States v. Butts*, 630 F. Supp. 1145, 1148 (D.Me.1986).

The harmless error doctrine, which is designed to insure objectively correct trial outcomes, is not applicable to those rights which are designed to serve individual dignity interests. *See McKaskle v. Wiggins*, 465 U.S. 168, 176, 177-78, n. 8 (1984). Similarly, this Court has warned that some constitutional rights are "so basic to the notion of a fair trial that their infraction can never be treated as harmless error." *Chapman v. California,* 386 U.S. 18, 23 (1967). The right to testify is such a right. *See Luce v. United States*, 469 U.S. 38, 42 (1984) ("an appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying.").

As Justice Godbold observed in his dissent in *Wright v. Estelle*, "[w]hen personal rights are involved, the harmless error rule does not apply because we are not concerned with the 'ultimate consequences' of trial, but with preventing the individual from being overcome by the criminal process." 572 F.2d 1071, 1081 (5th Cir.1978), *citing Price v. Georgia*, 398 U.S. 323 (1970) (harmless error inapplicable to double

jeopardy analysis). The same logic is applicable to the *Strickland* prejudice prong, and thus to the Fifth Circuit's concern with the ultimate consequences of trial, rather than with the essential issue of whether the defendant has made a conscious decision to waive a personal, fundamental right.

CONCLUSION

This Court must finally address the inconsistency between the Fifth Circuit's approach and the Court's longstanding affirmation that fundamental constitutional rights may be waived only by the defendant, and that infractions upon rights which are basic to a fair trial cannot require a showing of prejudice to warrant relief. This Court is respectfully urged to grant Kenneth Vicknair's petition for a writ of certiorari.

New Orleans, Louisiana, this 1st day of May, 2009.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30932
USDC No. 2:07-CV-588
USDC No. 2:03-CR-16-2

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

KENNETH VICKNAIR

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Feb. 4, 2009)

ORDER:

Kenneth Vicknair, federal prisoner # 28240-034, was convicted by a jury of one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), and one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1343. The district court sentenced him to concurrent terms of 60 months in prison on each count.

Vicknair filed a 28 U.S.C. § 2255 motion, asserting ineffective assistance of counsel on various grounds.

The district court denied the motion. Vicknair now seeks a certificate of appealability (COA), arguing that the district court improperly rejected his claim that counsel unconstitutionally interfered with his right to testify. As that is the only ground he now argues, his other claims are not presented for review. *See Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999). He also seeks to supplement the record on appeal.

Applying the two-pronged analysis set forth in *Strickland v. Washington*, 466 U.S. 688 (1984), the district court concluded that, even assuming counsel's conduct was constitutionally deficient, Vicknair failed to demonstrate prejudice. The district court found Vicknair "to be a combative, incredible, and generally difficult witness" whose version of the facts was "significantly contradicted by other evidence offered at trial," and who "would have been vigorously and damagingly cross-examined had he testified." Vicknair challenges the district court's ruling by arguing, particularly in reliance on *United States v. Mullins*, 315 F.3d 449 (5th Cir. 2002), that counsel improperly waived Vicknair's right to testify over his objection. In order to obtain a COA, Vicknair must demonstrate that jurists of reason "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Vicknair has failed to make the required showing.

The motion to supplement the record on appeal is GRANTED. The motion for a COA is DENIED.

/s/ Jennifer W. Elrod
JENNIFER WALKER ELROD
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES	**CRIMINAL ACTION**
VERSUS	**No. 03-16**
KENNETH VICKNAIR	**SECTION: I**

ORDER AND REASONS

Before the Court is the motion of defendant, Kenneth Vicknair, to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The Court previously denied defendant's motion in part and set a hearing to determine the sole remaining issue of whether defendant received ineffective assistance of counsel with respect to his failure to testify at trial. For the following reasons, defendant's motion is **DENIED**.

BACKGROUND

On April 29, 2004, defendant was charged in a two-count superseding indictment with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) and conspiracy to commit fraud by wire communication in violation of 18 U.S.C. § 1343.[1] During the course of the conspiracy, defendant became involved in a transaction with two co-defendants to sell Venezuelan promissory notes to undercover

[1] Rec. Doc. No. 61.

federal agents. Prior to completing this transaction, the undercover federal agents represented to defendant that they were acting on behalf of drug dealers and were purchasing the notes to launder drug money. Defendant was represented at trial by John E. DiGiulio, Esq., and co-counsel Dylan Utley, Esq. At trial, defendant did not testify and did not call any witnesses in support of his defense. On August 2, 2005, after a two-day trial, a jury returned a verdict of guilty as to both counts.[2] Defendant was sentenced on June 15, 2006, to a term of imprisonment of 60 months as to each count, to be served concurrently.[3] On February 2, 2007, defendant filed this motion.

In his motion, defendant argued that he was denied his right to effective assistance of counsel at trial as guaranteed by the Sixth Amendment to the United States Constitution. Specifically, defendant argued that: (1) his attorney was mentally incompetent at trial because of a recent surgery and because he was under the influence of prescription pain medication; (2) his attorney prevented him from testifying at trial; (3) his attorney failed to call both expert and lay witnesses; (4) his attorney failed to make objections during the trial, and (5) his attorney's opening argument, cross-examinations, and closing arguments were ineffective. On April 26, 2007, this Court denied defendant's motion in part, reserving

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[2] Rec. Doc. No. 185.

[3] Rec. Doc. No. 260, p. 2.

judgment as to whether defendant's counsel impermissibly prevented him from testifying at trial and setting an evidentiary hearing to investigate this issue.[4] The Court later denied defendant's motion for reconsideration.[5]

The Court's evidentiary hearing stretched over three sessions, during which both defendant and the United States were able to question witnesses and present oral argument to the Court.[6] In addition, defendant and the United States submitted extensive supplemental memoranda to brief this remaining issue.[7]

LAW AND ANALYSIS

I. Standard of Law

The standard for judging the performance of counsel was established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the United States Supreme Court established a two-part test for evaluating claims of ineffective assistance of counsel that requires the petitioner to prove deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 697, 104 S. Ct.

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[4] Rec. Doc. No. 316.

[5] Rec. Doc. No. 324.

[6] *See* Rec. Doc. Nos. 327, 331, 336.

[7] Rec. Doc. Nos. 339, 341.

2070-71. The Supreme Court first held that "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S. Ct. at 2064. Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068; *see also United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999). In deciding ineffective assistance of counsel claims, this court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test. *Kimler*, 167 F.3d at 893.

The second prong of the *Strickland* test looks to the prejudice effected by counsel's deficient performance. This requires "'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *United States v. Mullins*, 315 F.3d 449, 456 (5th Cir. 2002) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). "[T]he defendant must show that counsel's errors were prejudicial and deprived defendant of a 'fair trial, a trial whose result is reliable.'" *United States v. Baptiste*, No. 98-207, 2007 U.S. Dist. LEXIS 21388, at *11 n.6 (E.D. La. Mar. 26, 2007) (Engelhardt, J.) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). "This burden generally is met by showing that the outcome of the proceeding would have been different but for counsel's errors." *Id.* (citations omitted).

II. Discussion

Defendant presents two arguments with respect to his counsel's performance: he contends that his counsel (1) impermissibly prevented defendant from testifying, despite his wish to do so, and (2) failed to fully advise him of his right to testify. Defendant next argues that, but for his counsel's deficient performance in failing to fully advise him of his right to testify, there is a reasonable probability that the outcome of his trial would have been different. Defendant contends that if he had taken the stand in his own defense, he would have been able to refute the prosecution's accusations and sway the jury in his favor. After a careful review of the trial transcripts and the evidence produced in connection with this motion, however, and notwithstanding the fact that defendant chose to call no witnesses, the Court finds that defendant would not have been a credible witness and that, even assuming that his counsel's performance was objective unreasonable, these alleged errors would not have prejudice him at trial. *See United States v. Araujo*, 77 F. App'x 276, 279 (5th Cir. 2003) (finding the defendant's proffered testimony insufficient to demonstrate prejudice under the second prong of *Strickland* even where "this proposed testimony would have been the only evidence to support affirmatively the defense theory" regarding defendant's presence at the scene); *United States v. Davis*, No. 02-060, 2006 U.S. Dist. LEXIS 44518, at *11-12 (E.D. La. Jun. 29, 2006) (Duplantier, J.) (finding no prejudice under *Strickland* where defendant

presented no defense witnesses and where "[r]elying on a defense which required the jury to find [the defendant's] testimony credible involved a significant risk, because good reason existed for the jury to not credit [the defendant's] testimony").

The defendant's lack of credibility was revealed during the Court's evidentiary hearings. For example, defendant admitted that, earlier during his career as a pilot, he had misrepresented the number of hours he had flown to secure employment.[8] Defendant's explanation of his involvement with a potential pay-per-view concert production leads the Court to believe that he may have misrepresented the investments he had secured in that business venture for the purpose of attracting additional investors.[9] The jury would also have been aware that defendant conducted the business transaction central to this case with men he knew to be felons.[10] Indeed, he wrote a letter to his wife just prior to his fateful meeting with undercover agents explaining that he did not trust his co-defendant, Harry Adair.[11] In addition, defendant contradicted himself before this Court: at sentencing,

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[8] Tr. of hr'g, pp. 103-05 (Jul. 2, 2007).

[9] Tr. of hr'g, pp. 108-17 (Jul. 2, 2007). When asked at his initial appearance whether he was employed, defendant failed to advise the Magistrate Judge of his employment as a consultant on the pay-per-view project. Tr. of hr'g pp. 117-19 (Jul. 2, 2007); Financial Aff. produced Jan. 16, 2003.

[10] Tr. of hr'g, pp. 119, 146-47 (Jul. 2, 2007).

[11] Tr. of hr'g, p. 148 (Jul. 2, 2007).

he testified that his counsel told him that he could not testify at trial;[12] at the hearing conducted pursuant to this motion, however, defendant stated the opposite.[13] When pressed to reconcile his two conflicting statements, defendant could produce no satisfactory answer.[14]

This Court's conclusion that defendant's performance on the witness stand would have been damaging is buttressed by testimony regarding defendant's trial preparation. Defense counsel's testimony revealed that defendant would have faced damaging cross-examination on the witness stand. During trial preparation, defense counsel conducted a mock examination of defendant. Both defense counsel noted that defendant's performance during this practice session was troublesome. As DiGiulio explained, "[I]t was my opinion that – well, it didn't go well. I mean, it wasn't the kind of thing that I would want to have happen in a trial. . . . [I]t wasn't so much on the facts of this case as on some other areas that it got into where Mr. Vicknair got pretty uncomfortable and, in fact, at the end asked whether it was okay to take the Fifth while he was testifying."[15] In an e-mail, defendant recognized the difficulty his testimony might present at

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[12] Rec. Doc. No. 308, p. 38.

[13] Tr. of hr'g, p. 91 (Jun. 15, 2007).

[14] Tr. of hr'g, pp. 91-93 (Jun. 15, 2007).

[15] Tr. of hr'g, p. 37 (Jun. 15, 2007); *see also* Tr. of hr'g, p. 12 (Jun. 21, 2007).

trial: "I know I have to curb my pride and arrogant tone in my testimony."[16]

The evidence adduced at trial also undermines the exculpatory value of defendant's potential testimony. At trial, Assistant United States Attorney Marvin Opotowsky testified that defendant had come to him to discuss counterfeit Venezuelan bonds; despite these concerns, however, defendant went forward with the transaction.[17] The testimony of Chien Lam, who was present at the meeting and arrested along with defendant, also contradicts defendant's version of the events. Lam testified that the duffle bags defendant had in his car were brought to carry large amounts of cash,[18] not merely to store and protect the bulletproof vests that defendant supplied, as defendant contends.[19]

Lam's testimony also provides one of the most damning contradictions of defendant's proposed testimony. During the transaction, the undercover officers identified themselves as the agents of powerful drug dealers and then briefly left the hotel room. Lam testified that, after relaying his concern about the propriety of the situation to defendant, defendant told Lam that "he didn't care where the money came

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[16] Def. Ex. 4, p. 16.

[17] Rec. Doc. No. 307, pp. 127-31.

[18] Rec. Do. *[sic]* No. 307, p. 261.

[19] Tr. of hr'g, p. 172 (Jul. 2, 2007).

from."[20] A central tenet of defendant's defense is that, when faced with the threats made by the putative agents of drug dealers, he only feigned continued interest in the transaction to safely extricate himself and his co-defendants from the situation. As Lam reported, however, defendant made the statement that "he didn't care where the money came from" outside the presence of the undercover agents; this undermines defendant's assertion that the statement was only made to appease the undercover agents and suggests, instead, that he acquiesced in the conspiracy to launder drug money. Lam's testimony would have cast significant doubt on defendant's version of the events.

In its observations of his conduct, the Court found defendant to be a combative, incredible, and generally difficult witness who would not have endeared himself to a jury. His version of the facts is significantly contradicted by other evidence offered at trial, and he would have been vigorously and damagingly cross-examined had he testified. Even assuming his counsel's performance was unconstitutionally deficient, defendant has not demonstrated a reasonable probability that, absent counsel's error, there would have been a reasonable doubt respecting guilt. Because defendant has not satisfied his burden with respect to the second prong of the *Strickland* analysis, the Court sees no need to investigate defendant's allegations

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[20] Rec. Doc. No. 307, p. 41.

with respect to the first prong and his counsel's performance at trial.

Accordingly,

IT IS ORDERED that the motion of defendant, Kenneth Vicknair, to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and, specifically, with respect to the remaining issue of whether defendant received ineffective assistance of counsel in relation to his failure to testify at trial,[21] is **DENIED**.

New Orleans, Louisiana, August 2nd, 2007.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

[21] Rec. Doc. No. 298.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES	**CRIMINAL ACTION**
VERSUS	**No. 03-16**
KENNETH VICKNAIR	**SECTION: I**

JUDGMENT

Considering the record, the Court's order dismissing the motion of defendant to vacate his sentence pursuant to 28 U.S.C. § 2255, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of the United States of America, and against defendant, Kenneth Vicknair, **DISMISSING WITH PREJUDICE** defendant's motion.[1]

New Orleans, Louisiana, August 2nd, 2007.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

[1] Rec. Doc. No. 298.